Spenser Wilkinson, J. : — In this case the accused was charged with attempting to export 42 motor tyres in contravention of the Prohibition of Exports Order, 1949. He pleaded guilty and was duly convicted on his plea and was fined $3,000 or 4 months' rigorous imprisonment in default. On an application at the conclusion of the trial by the prosecution for an order of forfeiture of the tyres the learned Magistrate refused to make an order following the ruling in the case of *Tan Kee Guan v. Rex*[1].

Subsequently the accused made application under section 108 of the Customs Enactment claiming the goods and, the matter having been referred to the Court by the Customs authorities under sub-section (iv) of section 108 the Magistrate issued a Summons under sub-section (v) of the same section.

In the course of the argument before him on the hearing of the Summons Counsel for the applicant admitted that the goods were liable to forfeiture. In spite of this, however, the learned Magistrate, still following the principle laid down in *Tan Kee Guan v. Rex*[1], refused to make an order for forfeiture. This decision of the Magistrate came before me by way of review.

It was argued on behalf of the Crown that the case of *De Keyser v. British Railway Traffic & Electric Co. Ltd.*[2] indicated that the duty of the Magistrate in the circumstances was to order forfeiture in spite of the fact that the English Customs law upon which that case was decided differs from the local law in one important respect. The question in that case was in regard to a conveyance in which uncustomed goods had been conveyed and under section 202 of the Act any such conveyance "shall be forfeited", and the judgments in *De Keyser's case*[2] to a great extent depend upon the interpretation of section 202 combined with section 226, which is very similar to sub-section (v) of our section 108.

I agree with the submission of the Deputy Public Prosecutor that the difference between the English Act and our Enactment is not so great as at first sight it appears to be. Our section 106 merely says that all goods liable to seizure under the Enactment "shall be liable to forfeiture", but then sub-section (ii) of section 108 provides that if goods seized be not forfeited by order of the Court before which the prosecution is had, or if there be no prosecution the goods shall be "taken and deemed to be forfeited" at the expiration of one calendar month from the date of seizure unless a claim thereto has been made before that date. In other words the goods "shall be forfeited" unless a claim is made. Under sub-section (iv) a claimant has to assert not only that he is the owner but also that the goods are not liable to forfeiture. I think the inference is irresistible that unless the claimant's claim is successful on both points the result must be forfeiture. I have no doubt, therefore, that the position under sub-section (v) of section 108 of the Customs Enactment is virtually the same as the position under section 226 of the English Act. Put in another way, it is clear that the word "may" where it first appears in sub-section (v) means "must", and the same interpretation should be given to the second word "may" in the same sub-section.

I think the learned Magistrate allowed himself to become a little confused between the position when the matter was before him at the conclusion of the trial when forfeiture, if ordered, would have been part of the punishment, and the position when the matter was before him again on an application under section 108 when the only matters into which he had to inquire were whether the applicant was the owner of the goods and whether they were liable to forfeiture. If *De Keyser's case*[2] had been cited to him his decision would probably have been different. On the second occasion, once he was satisfied that the goods were liable to forfeiture, his duty was to carry out the machinery provided by section 108 by ordering a forfeiture.

Mr. C. O. Lim, who appeared on behalf of the owner, agreed with the proposition of law put forward by the Deputy Public Prosecutor. I therefore varied the order of the learned Magistrate and substituted an order that the goods in question be forfeited.

Order accordingly.

LEE TENG TAI v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore) and Whitton, J.) November 14, 1952]

[K.L. — Federation Criminal Appeal No. 77 of 1952]

Emergency Regulations, 1948, regulation 4(1)(b) — Possession of ammunition — Alleged possession in 5 different places contained in one charge — Whether irregular — Corroboration — Burden of proof.

This appeal raises, inter alia, one important point, namely, whether the charge which alleged possession of a handgrenade at 5 different places over a period exceeding 12 months was bad.

Held: (Sir Charles Murray-Aynsley, C.J. dissenting): Possession is of its nature continuous, and so long as the appellant continued to be in possession, the offence was continuing. It was open to the prosecution to charge a continuous act of possession over a period of time. The particulars of the places where possession would be proved could well have been omitted from the charge, but since the charge alleged one continuous offence there is no irregularity.

Per Sir Charles Murray-Aynsley, C.J.: If the words of the charge are to be given their natural meaning, five

distinct acts of possession are alleged not one act of continuous possession. This is bad on two grounds: the number of the acts and the time over which they are distributed. The Court is not entitled to consider what in point of fact was proved at the trial, still less what the prosecution announced its intention of proving.

COURT OF APPEAL (CRIMINAL).

S. P. Seenivasagam for the appellant.

D. W. D. Good (D.P.P.) for the Public Prosecutor.

Cur. Adv. Vult.

Mathew, C.J. : —The appellant in this case was convicted of the offence of possessing ammunition to wit a hand grenade contrary to regulation 4(1) (b) of the Emergency Regulations, 1948, and was sentenced to death. Counsel for the appellant has put forward a number of grounds of appeal which can conveniently be grouped under three heads :—

(i) The charge was bad as it disclosed 5 separate and distinct offences which should have been made the subject of separate charges. Even if the charge was not bad, it was framed in such a way as to cause grave prejudice to the accused. Although the trial had proceeded on the basis of a continuing offence, the prosecution had conceded that there could have been more than one hand grenade possessed, and therefore there were 5 separate acts of possession.

(ii) The direction of the assessors by the trial judge on the question of corroboration was inadequate.

(iii) The burden of proof was not adequately explained to the assessors.

The charge reads :—

"That you, between the 15th day of July, 1948, and the 30th day of September, 1951, at Kepayang, Gunong Repat, Tikus and Juang, Kramat Pulai, in the district of Kinta, in the State of Perak, did have in your possession ammunition, to wit a hand grenade, without lawful authority therefor, and that you did commit an offence punishable under regulation 4(1)(b) of the Emergency Regulations, 1948."

Although the charge contains particulars of five places in the district of Kinta, it is clear from the record that the prosecution case from the outset was that over a long period the appellant had been continuously in possession of ammunition in the form of a hand grenade. The places mentioned in the charge were no more than an indication to the appellant that possession would be proved at five places. The view of the prosecution on the statements of the witnesses was that the evidence disclosed a continuing act of possession. On this view it would have been improper to allege five offences when only one had been committed.

Had the charge been dealing with separate and distinct offences which are complete when committed, there would be a fatal objection to the charge on the ground that it contravened the mandatory provisions of the Criminal Procedure Code relating to charges. In this case, the particulars of the places where possession would be proved were included in the charge, an unnecessary addition which could well have been omitted. Had the accused required particulars, she could have asked for them. Possession is of its nature continuous, and so long as possession continues the offence continues. There can be no doubt that it was open to the prosecution to charge a continuous act of possession over a period exceeding 12 months, and it would have been artificial and wrong for the prosecution, taking the view it did of the statements of witnesses, to break up a continuous offence into five separate offences.

The possibility that the appellant may have changed one hand grenade for another during the period does not seem to me to be material. So long as the appellant continued to be in possession of ammunition to wit a hand grenade the offence was continuing. It is clear from the learned trial judge's summing up that the assessors were left in no doubt as to there being one offence only and not five. He said :—

"The charge regarding the dates is that she was in possession of a hand grenade between the 15th day of July 1948 and the 30th day of September 1951..... Thus the charge is quite obviously one of continuous possession. The prosecution says that during that period she was seen carrying a hand grenade. What the prosecution did was to call a large number of witnesses who, if believed, saw her on various dates and who deposed that when they saw her she had a hand grenade, and from that the prosecution asks you to infer that any person, who could be seen in so many different parts of the State always carrying a hand grenade, must have had one somewhere she could get at it any time she wanted or, alternatively, there was one in the store somewhere she could call for it if she so desired."

There is in my view no irregularity or illegality in the charge which alleges one continuing offence and not a series of distinct and separate offences.

Counsel for the appellant has argued that the evidence of consorting which was led by the prosecution was prejudicial to the appellant. In a case of this nature it was impossible for evidence of consorting to be excluded. The witnesses who gave evidence on possession were for the most part ex-bandits, and they testified to the appellant being in possession of a hand grenade at a number of bandit camps. The reason for their being able to identify her was that she was a fellow bandit. This evidence is clearly admissible, both to prove possession of a hand grenade, and, under section 9 of the Evidence Ordinance, to negative the possible suggestion that the appellant was in possession of the ammunition for a lawful purpose.

Counsel for the appellant further argued that the direction of the learned trial judge on corroboration was inadequate, and in particular that the learned trial judge did not tell the assessors that the evidence of one accomplice could not be corroborated by another accomplice. In our view, the summing up in this part was not open to objection. The trial judge went further than he need have done when he said :—

"Strictly speaking, I think seven of the others are not accomplices, but they are so nearly so that I think

it would be safer and, indeed, you must, treat them as accomplices because after all they are all ex-bandits and it is a mere technicality to say that because they did not carry a hand grenade but carried a sten gun instead that they are not accomplices. Gentlemen, I direct you to treat all these nine witnesses as accomplices. Well now, that means that you cannot accept their evidence unless it is corroborated as to a material fact tending to connect the accused with the commission of the crime with which she is charged. It does not mean that every fact deposed to by these witnesses has to be corroborated. It simply means that one fact by one witness or more is sufficient to enable you to say: "well, that ex-bandit witness said that, and a completely innocent witness says the same thing or something which is nearly the same, and, therefore I think that bandit witness is right." "

He made it perfectly clear that an ex-bandit witness had to be corroborated by an innocent witness.

It has further been contended on behalf of the appellant that the passage in the summing up of the trial judge on the question of evidence tending to connect the accused with the commission of the offence charged was wrong. I agree that the passage in his summing up was not very happy, but taking the summing up as a whole the assessors were not left with the impression that they must convict the appellant if they were satisfied that she consorted with bandits.

There are two passages in the summing up which deal with the burden of proof. The first is as follows :—

"The first one is that all accused persons are presumed to be innocent until they are found guilty, and the second one is that the onus of proof, that is to say, the duty of proving the guilt of the accused, is on the prosecution. There is no onus or obligation on the accused person to prove his or her own innocence. The duty is solely on the prosecution to prove the guilt of the accused."

And the second :—

"Now, what is her evidence? But before I consider that I should refer to one important direction in law that I have to give you at this stage. The prosecution has to prove the guilt of the accused beyond reasonable doubt. Well now, the learned Mr. Deputy this morning explained reasonable doubt to you. It is a doubt such as one which may arise in your private lives when you have to make a decision on an important matter and which compels you to act one way or the other. In other words, you do, or you don't do, something because you are doubtful of the consequences. That is reasonable doubt. Now, in the case of the defence, the standard of proof is quite different. In the case of the defence it is a mere balance of probability — the same as in a civil case. Well now, you may say: "you have set us 2 standards of proof, how are we to apply them to the same set of facts?". This is how you do it. You first consider the evidence of the prosecution only and you go through the various facts attempted to be proved, and you ask yourselves which facts have been proved beyond reasonable doubt. Having ascertained those facts from the prosecution end, you then turn to the statements of the defence. In other words, you consider the whole evidence and the statement in the case and say — what did the accused say regarding those factors which I have found as facts? If you consider that the accused's explanation is just more probably true — then you find that fact in her favour. So for the defence a mere balance of probability is sufficient."

No possible exception can be taken to the first direction, but the second half of the second direction is at first sight a little difficult to follow on account of the paragraphing used by the typist. The first part of the second direction re-emphasises the need for the prosecution to prove the guilt of the accused beyond all reasonable doubt. The second part of the direction starts with the words : "Now, in the case of defence, the standard of proof is quite different." This passage of the summing up should have been contained in a different paragraph and should be read with the next succeeding paragraph which deals with the accused's defence which was that she was never in the jungle and was at all material times either in Ipoh or Singapore. It was for the accused to prove her *alibi,* but as the trial judge points out, the standard of proof required of an accused person is not as high as as that required of the the prosecution. Taken as a whole, we think that the assessors were left in no doubt that the burden of proof was on the prosecution who had to prove the case beyond all reasonable doubt.

In considering all the evidence in this case, there is one part of the evidence which stands out, and that is the evidence which relates to the possession of a hand grenade during the period the appellant was at Juang. Two ex-bandits, Ng Ah Tong P.W. 6 and Rajoo P.W. 8, testify to the fact that they were present at a camp in Juang and that at that time the appellant was in possession of a hand grenade. This evidence is corroborated by independent evidence which cannot seriously be challenged. In March 1951 the Security Forces made a raid on a bandit hide-out and some photographs were captured. These photographs have been exhibited, and the two most important ones are Ex : E1. and D.1. The first shows a group of bandits amongst whom are the witness P.W. 6 and P.W. 8 and a woman Ah Ying. The second photograph is of the appellant and Ah Ying, and in this photograph the appellant is wearing what is obviously a hand grenade at her waist. The two witnesses testified that these photographs were taken on the same day at Juang, and a comparison of the two photographs, in so far as the appearance of the woman Ah Ying is concerned, shows that the photographs were most probably taken on the same day. On this part of the evidence no reasonable assessor could have come to any other conclusion than that the appellant was guilty of possessing a hand grenade while she was in the bandit camp at Juang. The period in question was in February 1951. The remaining evidence covers the periods on either side of February 1951, and there is independent corroborative evidence of much of what has been testified to by the ex-bandit witnesses. Whether continuity of possession has been proved beyond all reasonable doubt for the whole period is immaterial, for there can be no doubt that possession

while the appellant was at Juang was proved beyond doubt. There is evidence on which the assessors could reasonably have deduced that the appellant was in continuous possession of a hand grenade between the dates charged. Even if their opinion on this was incorrect, there always remains the period at Juang which must be viewed as proved beyond doubt.

The appeal is dismissed.

Sir Charles Murray-Aynsley, C.J., (S.) : — In this case I find myself unable to agree. The reason for my disagreement is on a matter of law and relates to the charge. It appears to me that if the words of the charge are to be given their natural meaning, five distinct acts of possession are alleged and not one act of continuous possession. Discontinuity in space involves also discontinuity in time. This is bad on two grounds : the number of the acts and the time over which they are distributed. In my opinion this is fatal and we are not entitled to consider what in point of fact was proved at the trial, still less what the prosecution announced its intention of proving. It is clear that there was no proof of continuous possession; for the year 1950 the evidence left an almost complete gap. That there was sufficient evidence of possession within the period alleged is clear enough. However, I regard the defect in the charge as fundamental and I would allow the appeal. I say nothing about the other grounds of appeal.

Whitton, J. : — I have had the advantage of reading the draft judgment of the learned President in this appeal with which I am in full agreement and have nothing to add.

Appeal dismissed.

R. v. KOH KWONG & ANOR.

[Cr. R. J. (Spenser Wilkinson, J.) November 17, 1952]

[Penang — Criminal Revision No. 20 of 1952]

Criminal Procedure Code (Cap. 21), s. 270 — Penal Code, s. 72 — Conviction in the alternative — Fine paid from money found on accused.

In this case the two accused were charged with housebreaking and theft and alternatively to the second charge with retaining stolen property, and convicted of this second charge and the alternative. The stolen property included an item of $40 cash. The 1st accused was sentenced to 12 months rigorous imprisonment and fined $50. $50 out of 51 found on the 1st accused was taken in settlement of the fine.

Held: (1) conviction in the alternative is permissible under section 270 of the Criminal Procedure Code and section 72 of the Penal Code. It should be used only where the doubt is between two offences of a similar gravity. A conviction in the alternative for housebreaking and receiving would not be justified because the accused should be given the benefit of the doubt and convicted of the lesser offence; (2) although it is impossible to identify the actual notes lost, the circumstances were so strong as to make it virtually certain that $40 of the $51 found on the 1st accused belonged to the complainant who is, therefore, entitled to restitution.

Case referred to :—

(1) *Rex v. James Loughlin* 25 Cr. App. Rep. 69.

CRIMINAL REVISION.

C. M. Sheridan for the Crown.

1st accused in person, 2nd accused absent.

Spenser Wilkinson, J. : — This case came before me by way of revision at the request of the learned President, who tried the case. The facts of the case are that at some time between 10 p.m. and 5 a.m. on the night of the 6th/7th August, 1952 the Presbystery at No. 3, Farquhar Street was broken into and cash amounting to $40, two fountain pens, a mouth organ and a watch were stolen therefrom. At 4.05 a.m. that morning a policeman saw a Chinese and a Malay running from the direction of China Street into Pitt Street and caught and searched them. On the person of one (the 1st accused) were found $51 and the two fountain pens and of the other (the 2nd accused) the mouth organ and the watch. The two accused were originally charged jointly with two offences; first with housebreaking by night under section 457 of the Penal Code and secondly with theft in a dwelling house under section 380 of the Penal Code. After the two accused had been charged the learned President added a Charge alternative to the Second Charge, of retaining stolen property under section 411 of the Penal Code. When the accused were called upon for their defence they neither of them gave evidence on oath but each made a statement from the dock which in my opinion would not have been accepted by any reasonable jury. These statements can, therefore, be ignored for the purposes of this revision. Having heard the defence the learned President acquitted both accused on the 1st Charge and recorded a conviction in the alternative against each accused on the Charge of theft and the retaining Charge. The 1st accused was sentenced to 12 months' rigorous imprisonment and fined $50 and the 2nd accused was released on bond under section 290 of the Criminal Procedure Code. A total of $51 had been found on Accused No. 1 and of this $50 was taken in settlement of the fine. Since then the Reverend Brother Serman, who was the complainant and whose cash was stolen, has applied to the learned President for the return of his $40.

Two points arose on this revision. The first was whether the alternative conviction was correct. Convictions in the alternative are unusual. They are